86-1037

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH A. IERVOLINO,

*Petitioner,*

v.

DELTA AIR LINES, INC.,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Was the burden of proof for respondent's "reasonable factors other than age" affirmative defense incorrectly placed on petitioner?
2. When an employer asserts as an affirmative defense that "age is a bona fide occupational qualification" ("BFOQ"), may the employer sustain that defense on the basis of factors other than age?
3. Was the treatment of the BFOQ issue, in jury instructions and in the exclusion of petitioner's evidence, in substantial conflict with *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985)?
4. Was the refusal to instruct the jury on petitioner's "disparate impact" theory in violation of Rules 1 and 16(e) of the Federal Rules of Civil Procedure?

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**JOSEPH A. IERVOLINO,**

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*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Joseph A. Iervolino respectfully prays that a writ of certiorari issue to review the decision of the court below.[1]

## OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 796 F.2d 1408 and appears in the Appendix hereto at page A1. The judgment of the court is reproduced at page

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[1] The following abbreviations are used in this brief: "A ___" refers to the Appendix to this brief; "Tr." designates pages in the trial transcript; "R.E." refers to the record excerpts filed in the court below; "PX" refers to petitioner's trial exhibits.

A34. The judgment of the district court is reproduced at page A38. The district court's decision denying petitioner's motion for judgment notwithstanding the verdict or for a new trial is not officially reported and is reproduced at page A39.

## JURISDICTION

The judgment of the court of appeals was entered on August 15, 1986. Iervolino's petition for rehearing which was timely filed was denied on September 25, 1986 (A36). This petition is filed within 90 days of the date of the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the district court was based on 29 U.S.C. §§ 216(b) and 626(c).

## STATUTES AND REGULATIONS INVOLVED

Sections 4(a)(1) and (2) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1) and (2), provide:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any

> individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; . . .

Section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1), provides in relevant part:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age. . . .

## STATEMENT OF THE CASE

This is an action by an airline pilot employed by Delta brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, challenging Delta's termination of his employment at age sixty.

Petitioner, Joseph A. Iervolino, was employed by respondent for thirty years until he was forced to retire. Five months before his sixtieth birthday, Iervolino requested to transfer ("down-bid") from his captain position to flight engineer ("second officer") and to continue his employment beyond age sixty. Delta denied his request and required him to retire. The entry in Iervolino's personnel file stated "Mandatory Retirement—Age 60" as the reason for the termination of his employment. (PX 9)

In answer to Iervolino's complaint of age discrimination, Delta alleged that its actions were excused under ADEA section 4(f)(1) because: (1) age less than sixty was a bona

fide occupational qualification reasonably necessary to the normal operation of the particular business ("BFOQ"); and (2) its refusal to permit Iervolino to transfer from captain to second officer ("two-step downbid") was based on reasonable factors other than age ("RFOA"), 29 U.S.C. § 623(f)(1). (R.E. 18)

At trial, Iervolino offered evidence that Delta's restrictions on downbidding were limited to persons at or approaching age sixty, and that the only well-established policy was that all crewmembers "will be retired at age 60," the "normal retirement age." (Tr. 903-04, 1851, 1868-69) Delta presented evidence to support its age sixty limit, including testimony on the changes said to occur with aging and the asserted inability to evaluate flight engineers over age sixty on an individual basis. Delta also presented evidence that it had a "two-step downbidding policy," not based on age, which prohibited captains from later serving as flight engineers for reasons of safety and "crew coordination." Delta sought to justify this assertedly age-neutral "policy" as a BFOQ ("*age* is a bona fide occupational qualification") and as a RFOA ("reasonable factors other than age").

The trial court placed the burden of proof on Iervolino with respect to Delta's RFOA defense. The court's instruction recited respondent's contention that its decision to retire Iervolino was "based upon a policy of not permitting two-step bid downs by any Delta captain to second officer regardless of age . . . [and] that its decision was based on reasonable factors other than age." (A40, Tr. 2828) The court then assigned the burden to Iervolino to disprove this defense by stating that "plaintiff may not recover unless he proves by a preponderance of the evidence that Delta did not have such a policy, or that the policy was not reasonably justified by legitimate

business purposes." The court instructed, in summary, that "plaintiff must demonstrate that this reason is but a pretext for discrimination on account of age."[2] (A.41, Tr. 2828)

The trial court also instructed the jury that Delta could meet its burden on the BFOQ defense with non-age based factors, including the effect that allowing Iervolino to serve as second officer would have on safety because of the impact of his presence on "crew command structure, crew communication and crew concentration or any other similar reasons relating to safety." (A43).

The trial court instructed the jury that it was not to judge the "reasonableness of Delta's safety precautions . . . [by] the standard of other bodies or other airlines," but instead "against Delta's own commitment to safety. . . ." (A44) This latter instruction followed evidentiary rulings during trial which barred Iervolino from adducing any evidence as to the identities of those major airlines which had no comparable age limitations for their flight engineers (Alaska, American, Braniff, Flying Tiger, Northwest, Pan American, TWA, United, USAir, and Western; *see* A23).

The jury rendered a general verdict in favor of Delta. Iervolino's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial was denied in an order dated October 3, 1984. (A39)

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[2] In placing the burden of proof on Iervolino to disprove Delta's RFOA defense, the trial court stated that it believed it was compelled to do so based on Fifth Circuit precedent. *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588 (5th Cir. 1978). The court stated its discomfort with the *Westinghouse* rule and asked plaintiff to assume the burden of proof to "save us from reversal in the Supreme Court because I'm not sure if the circuit will survive up there." (Tr. 2715)

On appeal the panel determined, with Judge Frank M. Johnson, Jr., filing a dissenting opinion, that the burden of disproving Delta's RFOA defense was correctly placed on Iervolino. The majority based its conclusion on its reading of Fifth Circuit precedent, saying that it had "repeatedly held that the plaintiff bears the burden of persuasion on the RFOA defense." (A11) As to the BFOQ instruction, the majority stated that even if the jury was improperly charged that non-age factors could support a BFOQ, given the substantial split in the circuits on this issue, the error was "harmless." The court reasoned that since Iervolino had been assigned the burden of disproving Delta's RFOA defense, it was "harmless error to also put the issue to the jury in the BFOQ context on which Delta had the burden of proof." (A16)

The majority decided that the balance of the charge to the jury on the employer's BFOQ defense was correct, despite the fact that the jury instruction on BFOQ "improperly mentioned reasonableness" throughout, rather than the standard of reasonable necessity required by the statute. (A12) The court concluded that the refusal to permit Iervolino to refer to or identify the many airlines operating without comparable age limitations for their flight engineers was error, but again "not reversible error" because Iervolino was permitted to introduce testimony of individual flight engineers working past age sixty without disclosing the names of their employers, together with a list of 485 flight engineers over age sixty on unidentified airlines.

Finally, the majority concluded that the trial court's refusal to instruct the jury on Iervolino's disparate impact theory of liability was not error since the words "disparate impact," even though discussed at the pretrial conference and included in plaintiff's "summary of con-

tentions," were not explicitly included in the pretrial order.

In his dissent, Judge Johnson concluded that the trial had been tainted by "obvious and substantial" errors involving key evidentiary rulings and essential jury instructions. (A33) Judge Johnson reviewed the BFOQ instruction and concluded that the trial court had signficantly departed from the "reasonably necessary" standard approved in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, ____, 105 S.Ct. 2743, 2751-56 (1985), and that the instruction here was equivalent to that which had been requested and rejected in *Western*, 105 S.Ct. at 2753-54. Judge Johnson concluded that the trial court's "error" was obvious and "substantial" (A33) in that, although the words "reasonable necessity" were in the charge, they were "buried in a mass of verbiage" and immediately followed by language instructing the jury that Delta's policy need only "be reasonable in light of considerations of safety." (A29-30; A42, Tr. 2830)

Judge Johnson noted that a fundamental error in the instruction occurred when the trial court confused the two prongs of the BFOQ test and permitted the second BFOQ prong to be "adjusted" by a "safety factor," thereby "introducing *subjective* factors" into that portion of the charge which the Supreme Court determined should function "as a strictly *objective* test" (A32, emphasis in original; *see Western*, 105 S.Ct. at 2754). The dissent concluded that the trial court "impermissibly redirected the focus, permitting looser fit for age-based generalities not tailored to the individual traits of employees." (A32)

Judge Johnson found that the "*objective* justification" (A33, emphasis in original) for a BFOQ required in *Western* was precluded in the trial court not only by clearly permitting a subjective justification for a BFOQ defense

in the instruction, but also by instructing the jury not to consider the differing standards of the FAA and of those " 'reputable businesses in the same industry that choose to eschew reliance on mandatory retirement earlier than age 70.' " (A33; *quoting from Western*, 105 S.Ct. at 2756) "The fact that so many allow what Delta denies suggests that the policy is not a BFOQ because it does not go to the essence of the business," Judge Johnson reasoned. (A33) The dissent concluded, relying on *Western*, that the practice of competitors is highly probative "and that it was an abuse of discretion to keep them out and the result of prejudice. Upon a proper comparison between the practice of Delta and that of its major competitors the jurors might well have reached a contrary conclusion on Iervolino's age claim." (A24) This, Judge Johnson concluded, along with the charge to the jury and other clearly erroneous rulings on the admission of evidence, "represent serious error at the trial level." (A25)

Judge Johnson also determined that the trial court's refusal to instruct the jury on Iervolino's right of recovery under a "disparate impact" theory was clearly erroneous. (A25-26) The dissent noted that Iervolino listed the issue specifically in his "summary of contentions" and presented evidence on the point at trial. (A26) Delta, on the other hand, did not object either to Iervolino's requested instruction on this issue on the grounds of surprise or prejudice, or to his disparate impact evidence at trial. (A26-27) Judge Johnson concluded that, based on the discussion about "disparate impact" at the pretrial conference (A27) and Iervolino's specific reference in the pretrial order to the key statutory provisions, 29 U.S.C. § 623(a)(1) and (a)(2), the trial court erred in refusing to give a disparate impact instruction. "Given the differences in the standard of proof for this theory, prejudice to Iervolino was inevitable." (A27)

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON WHETHER AN EMPLOYEE BEARS THE BURDEN OF PROOF ON AN EMPLOYER'S "REASONABLE FACTORS OTHER THAN AGE" AFFIRMATIVE DEFENSE.

In 1984 this Court granted a petition for a writ of certiorari on the identical issue presented here, *viz.* whether the "burden of persuasion . . . shifts to the employer to prove that the determining cause was a reasonable factor other than age (*i.e.*, that age was *not* the determining factor)." *Western Air Lines, Inc. v. Criswell*, 469 U.S. 815 (1984).

In its decision on the merits, however, the Court declined to reach this issue because a careful review of the jury instructions revealed that, contrary to Western's claim, the burden was "placed on plaintiffs on the RFOA issue." 105 S.Ct. at 2749 n. 10. The Court declined to determine whether the burden had been correctly assigned, deciding only that "[b]ecause the plaintiffs were assigned the burden of proof, we need not consider whether it would have been error to assign it to the defendant." *Id.*

The issue as to where the burden of proof for the "RFOA" defense is to reside is still unresolved, and the lower courts are in total disarray. The Third, Sixth, Eighth, and Ninth Circuits, and district courts in the District of Columbia, Fourth, and Seventh Circuits have determined either that the burden rests on the employer to prove the RFOA defense or that it is an "affirmative

defense."[3] This is consistent with this Court's determination under the Equal Pay Act, 29 U.S.C. § 206(d), that the burden of proof rests with the employer to prove that any wage differential among employees is based on a "factor other than sex." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974).

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[3] Courts which either have assigned the burden of proof to defendant on the RFOA defense or have described the RFQA as an affirmative defense include: *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 552-53 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400, 105 S.Ct. 2743 (1985); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 408 (9th Cir. 1981); *see EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211, 222-23 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984) ("Westinghouse has failed to establish a Section 4(f)(1) defense."); *EEOC v. Westinghouse Electric Corp.*, 632 F.Supp. 343, 365 & n.11 (E.D. Pa. 1986); *Marshall v. Roberts Dairy Co.*, 572 F.2d 1271, 1272 & n.3 (8th Cir. 1978); *Cova v. The Coca-Cola Bottling Co. of St. Louis, Inc.*, 574 F.2d 958, 959-60 (8th Cir. 1978); *EEOC v. Air Line Pilots Ass'n*, 489 F.Supp. 1003, 1006 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 315 (6th Cir. 1975); *Mastie v. Great Lakes Steel Corp.*, 424 F.Supp. 1299, 1307 (E.D. Mich. 1976); *Marshall v. Goodyear Tire and Rubber Co.*, 19 Empl.Prac.Dec. (CCH) ¶ 8973 at 6048-49 (W.D. Tenn. 1979); *Grohs v. Gold Bond Building Products*, 627 F.Supp. 1555, 1558 (N.D. Ill. 1986) (RFOA is an "affirmative defense"); *Marshall v. Baltimore & Ohio R.Co.*, 461 F.Supp. 362, 372 (D. Md. 1978), *aff'd in part and rev'd in part on other grounds*, 632 F.2d 1107 (4th Cir. 1980), *cert. denied*, 454 U.S. 825 (1981); *Bishop v. Jelleff Associates*, 398 F.Supp. 579, 593 (D.D.C. 1974); *EEOC v. Great Atlantic & Pacific Tea Co.*, 618 F.Supp. 115, 119 (N.D. Ohio 1985). Both federal agencies which have enforced the ADEA have interpreted the statute to assign the burden of establishing the RFOA defense to the employer. *EEOC Guidelines*, 29 C.F.R. § 1625.7(e) (1983); *Wage and Hour Division Guidelines*, 29 C.F.R. § 860.103(e) (1983). *Cf. Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985) (reference to "the ADEA's five affirmative defenses"); *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 197 n.4, 200, 201 (1977) (reference to ADEA's § 4(f)(2) defense, 29 U.S.C. § 623(f)(2), as an "exemption" or "exception").

Other circuits, including the court of appeals below, and the First, Second, Fifth, Sixth, and Tenth Circuits, have assigned the burden on plaintiff to disprove the RFOA defense. These courts sometimes describe the employer's burden as one merely to articulate "reasonable factors other than age," while requiring plaintiff to prove that such "other factors" are "pretext."[4]

Other courts considering the issue are unclear and have not decided specifically on whom the burden should be imposed.[5] As the court stated in *Massarsky v. General Motors Corp.*, 706 F.2d 111, 117 n.11 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983), the RFOA exception "has enjoyed a two-fold interpretation." First, the RFOA has been raised as a denial of discrimination on the basis of age, in which case the exception is unnecessary since there was no discrimination "because of age." Second, as was the situation below, the RFOA has been raised as a traditional affirmative defense in that the employer offers a "defense to discrimination under the ADEA. . . ." *Id.* This

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[4] Courts which have assigned the burden of proof to plaintiff to disprove the RFOA defense include: *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, 590 (5th Cir. 1978); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1011 (1st Cir. 1979); *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, 920-21 (6th Cir. 1984); *Parcinski v. Outlet Co.*, 673 F.2d 34, 36 (2d Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983); *EEOC v. Wyoming Retirement System*, 771 F.2d 1425, 1429 (10th Cir. 1985).

[5] Decisions which are unclear as to the burden of proof include: *Holley v. Sanyo Mfg. Inc.*, 771 F.2d 1161, 1168 (8th Cir. 1985); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1180 n.5 (6th Cir. 1983); *Johnson v. American Airlines, Inc.*, 745 F.2d 988, 993 n.3 (5th Cir. 1984) (referring to RFOA as a "defense"), *cert. denied*, 105 S.Ct. 3500 (1985); *Crimm v. Missouri Pacific R. Co.*, 750 F.2d 703, 712-13 (8th Cir. 1984) ("The employer must demonstrate reasonable factors other than age for discharge" but "need not persuade the [trier of fact] that the proffered reason in fact justified the discharge. . . .")

second interpretation is at the heart of the controversy in this case.

This Court should review the decision below to resolve the substantial and expanding conflict as to the assignment of the burden of proof on the "reasonable factors other than age" defense under the ADEA.

## II.

## THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO WHETHER AN EMPLOYER MAY PROVE THAT "AGE IS A BONA FIDE OCCUPATIONAL QUALIFICATION" BASED ON FACTORS OTHER THAN AGE.

In addition to the contention that an age-neutral two step downbidding "policy" was justified as a reasonable factor other than age, Delta contended that the same "policy" was excused because "age is a bona fide occupational qualification." The same evidence offered to support its RFQA defense was submitted to justify Delta's BFOQ, including evidence that the prohibition on all captains from later serving as flight engineers was necessary to avoid "role reversal," intimidation by a former captain of other crew members, and impaired crew communication.

The court of appeals approved an instruction on the BFOQ defense which permitted the jury to consider various non-age factors. The instruction made at least eleven references to Delta's "policy of not permitting two-step bid downs" (its "policy"), which respondent steadfastly asserted was age-neutral. (A40-44, Tr. 2828, 2830-32) The court allowed the jury to use Delta's "policy" and various other non-age factors in making its determination, as follows:

> In assessing the bona fide occupational qualification defense asserted by Delta, you may consider more than simply the individual plaintiff's ability to perform the tasks of the second officer job.
>
> You may also consider the effect that allowing the plaintiff or others situated to serve as second officer would have on the safety of Delta's operations because of its effect on crew command structure, crew communication and crew concentration or any other similar reasons relating to safety.

(A43, Tr. 2831-32)

The court specifically noted that the circuits are divided on whether a BFOQ may be proved by factors other than age. The Fourth, Seventh, and Ninth Circuits, and several district courts, have refused to permit an employer to justify a BFOQ defense based on non-age based factors.[6] The Eleventh Circuit has taken a similar position in a case involving the BFOQ defense under Title VII. *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543, 1549 (11th Cir. 1984). Those cases, however, are squarely in conflict with decisions in the District of Columbia and Fifth Circuits.[7]

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[6] The jury instruction below is in conflict with decisions in *EEOC v. County of Los Angeles*, 706 F.2d 1039, 1042 (9th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 755 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983); *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 308 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982); *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, 591 (5th Cir. 1978); *EEOC v. County of Allegheny*, 519 F.Supp. 1328 (W.D. Pa. 1981), *aff'd*, 705 F.2d 679 (3d Cir. 1983); *EEOC v. Marathon County*, 27 Empl.Prac.Dec. (CCH) ¶ 32,274 (W.D. Wis. 1981); *Marshall v. Goodyear Tire and Rubber Co.*, 19 Empl.Prac.Dec. (CCH) ¶ 8973 (W.D. Tenn. 1979).

[7] *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 100-01 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *Johnson v. American Airlines, Inc.*, *supra*, 745 F.2d at 991-93 (5th Cir. 1984).

The statutory defense, by its terms, applies only when age is a BFOQ. The split among the six circuits to have considered the issue of whether non-age factors may support the defense requires resolution by this Court. The issue has arisen with greater frequency in recent years, and the unsettled nature of this important principle threatens the ability of the lower courts to interpret and apply the ADEA fairly and effectively, consistent with this Court's opinions in *Western* and *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353, 105 S.Ct. 2717 (1985).[8]

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[8] The court below said it was not compelled to decide whether the BFOQ instruction erroneously permitted the defense to be proved with non-age factors, since the RFOA instruction had placed the burden of proof on plaintiff. Therefore, the court concluded, even if the BFOQ instruction was improperly stated, it was "harmless error." (A16)

The court's rationale is impossible to follow. In instructing the jury on BFOQ, the trial court never distinguished between evidence relating to Delta's downbidding policy and that relating to its aging/medical/individual evaluation evidence. Since the trial court permitted the jury to consider factors which were arguably impermissible in deciding the BFOQ issue, it is inconceivable how such an instruction, if error, could have been "harmless." Moreover, because the jury rendered a general verdict, there is simply no way to determine whether the case was decided based on irrelevant considerations.

Of course, the court's logic totally evaporates if the RFOA instruction was erroneous as argued in Point I. But even if the RFOA instruction was correct, the trial court should not have been relieved of its responsibility to give the correct instruction on the BFOQ defense. Permitting the jury to consider extraneous factors in deciding whether a statutory affirmative defense has been proven cannot be "harmless error," particularly in light of the Supreme Court's mandate that this particular defense is to be "extremely" narrowly construed, lest it emasculate the ADEA's overall statutory scheme and purpose. *Western*, 105 S.Ct. at 2750-51; *Trans World Airlines*, 469 U.S. at 120.

## III.

## THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE JURY INSTRUCTIONS AND EVIDENTIARY RULINGS ON THE BFOQ DEFENSE TO ASSURE ADHERENCE TO THE STANDARD ANNOUNCED IN *WESTERN AIR LINES, INC. v. CRISWELL.*

The charge to the jury approved by the court of appeals differed substantially and fundamentally with that approved in *Western*. First, the jury was instructed to find for respondent on the BFOQ defense if it found that Delta's "policy" was "reasonable in light of considerations of safety." (A42, Tr. 2830). This instruction is flatly contrary to this Court's decision in *Western* that the BFOQ must be "reasonably necessary" and that a standard of "reasonableness" is "inconsistent with the preference for individual evaluation expressed in the language and legislative history of the ADEA." *Id.* at 2756. Permitting an employer to prove a BFOQ based upon a "reasonableness" standard, as approved below, is "plainly at odds with Congress' decision, in adopting the ADEA, to subject such management decisions to a test of objective justification in a court of law. The BFOQ standard adapted in the statute is one of 'reasonable necessity,' not reasonableness." *Id.* at 2754; *see* A33.

The opinion below sanctioned a substantial departure from *Western* in other ways as well. By approving the trial court's exclusion of the identities of all major airlines which employ flight engineers over age sixty, the court effectively eviscerated this Court's determination that the practices of other "reputable businesses in the same industry that choose to eschew reliance on mandatory retirement earlier than age 70" are highly probative. *Id.* at 2756. The determination by the court below that the trial court's exclusion of this evidence was "probably

error" but "not reversible error" (A20) is incomprehensible. As Judge Johnson said in dissent, the exclusion of the contrary practices and experience of specific airlines such as Alaska, American, Braniff, Flying Tiger, Northwest, Pan American, TWA, United, USAir, and Western Airlines permitted the jury to speculate that the numbers and size of those airlines permitting age sixty flight engineers were small. Judge Johnson observed, consistent with this Court's opinion in *Western*, 105 S.Ct. at 2756, that the "*best evidence* one could offer to prove or disprove age-based discrimination is the general practice and experience of the industry as a whole. . . . It was an abuse of discretion to keep them out and the result of prejudice." (A24; emphasis supplied)

This Court should grant review on this ground as well, to resolve any lingering confusion as to the teachings of *Western* and to assure adherence to the Age Discrimination in Employment Act.

## IV.

## THE TRIAL COURT'S UNREASONABLY INFLEXIBLE INTERPRETATION OF THE PRETRIAL ORDER IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The Court should grant the petition to resolve the scope of Fed.R.Civ.P. 16(e) and its application below which denied petitioner the "just...determination" to which he was entitled under Fed.R.Civ.P. 1. This issue calls for the exercise of this Court's power of supervision to remedy a serious injustice in this case.

The trial court refused to instruct the jury on Iervolino's disparate impact model of proof, preventing him from an alternate means of recovery which does not require proof

of intent, as is required in a disparate treatment case. (A25 n.1; *see Nash v. Consolidated City of Jacksonville*, 763 F.2d 1393, 1397 (11th Cir. 1985) (Title VII)[9]

The reason given by the trial court for refusing to give Iervolino's proferred instruction was that he had not expressly stated "disparate impact" as an issue in the pretrial order. By its terms, the pretrial order required petitioner to state the "legal issues to be tried." Accordingly, Iervolino paraphrased and made specific reference to the ADEA's substantive prohibitions, 29 U.S.C. § 623(a)(1) and (a)(2), but did not use the words "disparate impact" or "disparate treatment" in the body of the pretrial order. Iervolino's "disparate impact" theory, however, was discussed orally at the pretrial conference and Delta never objected to petitioner's disparate impact evidence at trial, or to his disparate impact jury instruction and statement of contentions submitted before trial began.[10]

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[9] The disparate impact model of proof has been applied extensively under the ADEA. *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1394-95 (9th Cir. 1984); *Criswell v. Western Air Lines, Inc., supra*, 709 F.2d at 522; *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *Monroe v. United Air Lines, Inc.*, 736 F.2d 394, 407 (7th Cir. 1984), *cert. dismissed*, 105 S.Ct. 983 (1985); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690-91 (8th Cir. 1983); *Allison v. Western Union Telegraph Co.*, 680 F.2d 1318, 1322 (11th Cir. 1982); *Douglas v. Anderson*, 656 F.2d 528, 531 n.1 (9th Cir. 1981); *Sakellar v. Lockheed Missiles and Space Co.*, 765 F.2d 1453 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 856 (1986); *Foster v. Arcata Associates, Inc.*, 772 F.2d 1453, 1458-59 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 1267 (1986); *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750 (5th Cir. 1982), *cert. denied*, 459 U.S. 967 (1982).

[10] Since Delta never objected to any of petitioner's disparate impact evidence, the issue was tried by implied consent of the parties. *Gorby v. Schneider Tank Lines, Inc.*, 741 F.2d 1015, 1022 (7th Cir. 1984).

# APPENDIX

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**Plaintiff-Appellant,**

**v.**

**DELTA AIR LINES, INC.,**
**Defendant-Appellee.**

**No. 84-8852**

United States Court of Appeals,
Eleventh Circuit.

Aug. 15, 1986.

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Appeal from the United States District Court for the Northern District of Georgia.

Before JOHNSON and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

ANDERSON, Circuit Judge:

Joseph Iervolino brought this action against his former employer, Delta Air Lines, Inc., alleging that Delta's refusal to permit him to transfer to the position of flight engineer violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A. §§ 621-634 (West 1985). On appeal from a judgment rendered on a jury verdict for Delta, Iervolino raises numerous challenges to the jury instructions, the denial of his motion for judgment notwithstanding the verdict ("JNOV") or alternatively for a new trial, and the district court's evidentiary rulings. We affirm.

## I. BACKGROUND

In its commercial airline operation, Delta operates a variety of aircraft, including the Lockheed 1011. This aircraft requires three crew members in the cockpit: a captain, a first officer, and a second officer. The captain is the pilot and controls the aircraft. He is responsible for all phases of its operation. The first officer is the copilot

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and assists the captain. The second officer or flight engineer usually monitors a side-facing instrument panel, and does not operate the flight controls.

A regulation of the Federal Aviation Administration prohibits any person from serving as a pilot or first officer on a commercial flight "if that person has reached his 60th birthday." 14 C.F.R. § 121.383(c) (1985). The FAA, however, has refused to establish a mandatory retirement age for flight engineers.

Delta employed Iervolino as a captain until his sixtieth birthday. In March 1980, five months before his retirement, Iervolino requested a transfer to the position of flight engineer so that he could continue his employment beyond age 60. Delta denied Iervolino's request, and he was retired on his sixtieth birthday.

Iervolino filed this action against Delta in the United States District Court for the Northern District of Georgia, arguing that Delta's refusal to permit him to transfer to a flight engineer position violated the ADEA. Delta defended its refusal to permit Iervolino to transfer to a flight engineer position on two grounds: (1) that its policy prohibiting captains from transferring to flight engineer positions ("two-step downbid") qualified as a reasonable factor other than age ("RFOA") within the meaning of 29 U.S.C.A. § 623(f)(1) (West 1985),[1] and (2) that the under-age-60 qualification for the position of flight engineer is a bona fide occupational qualification ("BFOQ") reasonably necessary to the safe transportation of passengers.[2]

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[1] Section 623(f)(1) provides in relevant part that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C.A. § 623(f)(1) (West 1985).

[2] Section 623(f)(1) provides in relevant part that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business." 29 U.S.C.A. § 623(f)(1) (West 1985)

At trial, the parties offered conflicting evidence as to the existence of a policy prohibiting two-step downbids. Iervolino contended that, except for pilots approaching age 60, Delta had permitted pilots to bid for any vacancy and awarded the bids based on seniority. Between 1973 and 1984, there were 936 transfers from captain to copilot or from copilot to flight engineer by crew members under age 60 ("one-step downbid"). Iervolino presented evidence of two instances in which Delta had permitted a two-step downbid. In 1978, Delta permitted Ralph Sexton to transfer from captain to flight engineer as the result of a medical condition which precluded his continued service as a captain. When Delta acquired Northeast Air Lines, Inc. ("Northeast") in 1972, two Northeast captains were also permitted to transfer to flight engineer positions at Delta.

Iervolino also introduced evidence suggesting that former captains serving as flight engineers would not present any "role reversal" problems. Iervolino pointed out that there have been no "role reversal" problems either when senior captains ride in a cockpit observer seat with more junior captains or when captains are given proficiency checks by senior check captains or FAA inspectors. Iervolino also claimed that Delta could evaluate a former captain's ability to serve as a flight engineer on an individual basis since Delta already evaluates captains on their ability to manage their crew in all situations and observes how well crew members interact and coordinate their efforts.

Delta, on the other hand, introduced evidence that it has a long-standing policy prohibiting captains from bidding down to flight engineer positions. Delta asserts that this policy was based on the safety problems associated with two-step downbids. Expert testimony indicated that when former captains serve as flight engineers, the roles of the crew members may become confused or ambiguous and former captains serving as flight engineers may intimidate other crew members during an emergency. Several pilots also testified as to the potential problems that could result from former captains serving as second officers. Delta also argued that since an individual pilot may be entirely un-

aware of any difficulty in his transition to a flight engineer position until after a problem occurs, it is impossible to predict which former captains would have difficulty in making the transition.

With respect to the question of whether the under-age-60 rule is a BFOQ for the flight engineer position, Iervolino offered a variety of evidence to support his contention that a flight engineer's normal duties are less critical to the safety of a flight than those of a captain or first officer. For example, the FAA has not extended the age-60 rule to the flight engineer position because the evidence indicates that flight engineers have rarely been a contributing cause or factor in commercial aircraft accidents and because flight engineers do not manipulate any flight controls. Iervolino also introduced evidence that 485 flight engineers over the age of 60, including 134 former captains, were serving on other commercial airlines. Finally, several former captains serving as flight engineers testified that they had experienced no difficulty in safely performing the flight engineer position.

Iervolino also offered evidence that it would be possible for Delta to evaluate its flight engineers on an individual basis for potentially disqualifying medical conditions. For example, Delta has relied on FAA-mandated medical examinations to assess, on an individual basis, the ability of pilots and flight engineers to perform their jobs safely and efficiently. Iervolino pointed out that Delta had permitted pilots to return to flight duty following the diagnosis of serious medically disqualifying conditions, provided these pilots could later pass medical examinations. Delta also has a system of proficiency checks designed to ascertain whether crew members can perform the required duties of the job safely and efficiently.

Delta contended, however, that the age-60 requirement is a BFOQ for the flight engineer position. First, Delta offered evidence that the flight engineer position is essential to flight safety. Several pilots testified that a flight engineer's failure to perform his duties properly could adversely affect flight safety, especially during emergen-

cies. An aircraft simulator demonstration and various accident reports were also introduced to illustrate the importance of a flight engineer's duties and the need for close coordination among cockpit crewmembers.

Delta also presented evidence that certain age-related diseases and infirmities (e.g., heart attacks, strokes, dementia, susceptibility to adverse drug reactions) become more prevalent at or around the age of 60, and that medical science cannot predict who will be susceptible to these diseases. Dr. John Rowe and Dr. Donald Kline concluded that there presently exists no reasonable method for Delta to evaluate its crew members on an individual basis.

After trial the jury returned a general verdict in favor of Delta, and the district court denied Iervolino's motion for JNOV or alternatively for a new trial. The following appeal ensued.

## II. ANALYSIS

On appeal, Iervolino challenges the jury instructions concerning Delta's policy prohibiting two-step downbids and the BFOQ defense, the denial of his motion for JNOV or for a new trial, and various evidentiary rulings. We consider each contention in turn.

### A. *Jury Instructions*

Iervolino raises numerous challenges to the jury instructions concerning Delta's policy prohibiting two-step downbids and the BFOQ defense. On appeal, we examine "the challenged instructions 'as part of the entire charge, in view of the allegations of the complaint, the evidence presented, and the arguments of counsel, to determine whether the jury was misled and whether the jury understood the issues.'" *National Distillers & Chemical Corp. v. Brad's Machine Products, Inc.*, 666 F.2d 492, 497 (11th Cir. 1982) (quoting *First Virginia Bankshares v. Benson*, 559 F.2d 1307, 1316 (5th Cir. 1977)); *see also Western Air Lines v. Criswell*, ___ U.S. ___, 105 S.Ct. 2743, 2755, 86 L.Ed.

2d 321 (1985) (reviewing jury instructions in the " 'context of the overall charge' and the circumstances of the case," including defendant's closing argument) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973)).

1. *Downbidding Policy*

Iervolino raises three challenges to the jury instructions with respect to Delta's policy prohibiting two-step downbids: (1) that the district court erroneously applied the test set forth in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), to the instant case; (2) that the instructions improperly permitted Delta to defend this policy on the inconsistent grounds of the RFOA and BFOQ defenses; and (3) that the burden of disproving the RFOA defense was incorrectly placed on Iervolino rather than Delta. We find no merit in these contentions.

Iervolino's first argument is that the *McDonnell Douglas* allocation of the burden of proof was inapplicable in the instant case because he presented direct evidence that Delta's policy prohibiting two step downbids was discriminatory on its face. We reject this contention.

The only evidence that arguably constitutes direct evidence of age discrimination is a notation in Iervolino's personnel file that the reason for his discharge was "Mandatory Retirement—AGE 60."[3] Plaintiff's Exh. 9. This state-

[3] Relying on *Trans World Airlines v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), Iervolino also asserts that Delta's policy prohibiting two-step downbids is discriminatory on its face, thus making the *McDonnell-Douglas* test inappropriate in the instant case. *Thurston*, however, does not support Iervolino. In *Thurston*, the Supreme Court held that the *McDonnell-Douglas* test does not apply when the plaintiff presents direct evidence of discrimination. 105 S.Ct. at 622. The direct evidence in *Thurston* consisted of a policy that expressly denied a privilege of employment on the basis of age:

(Footnote continued on following page)

ment, however, is ambiguous: it could mean either that Iervolino was forced to retire from Delta at age 60 or that Iervolino was simply retired from his position as a captain but remained free to continue his employment with Delta in a non-flying position. Iervolino asserts that the record supports the former interpretation,[4] and con-

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[3] *continued*

> Captains who become disqualified from serving in that position for reasons other than age *automatically* are able to displace less senior flight engineers. Captains disqualified because of age are not afforded this same "bumping" privilege. Instead, they are forced to resort to the bidding procedures set forth in the collective-bargaining agreement. If there is no vacancy prior to a bidding captain's 60th birthday, he must retire.

105 S.Ct. at 621 (emphasis added) (footnote omitted).

In the instant case, however, the parties disagreed about whether Delta's policy prohibiting two-step downbids was based on age. Although Iervolino offered evidence suggesting that this policy was only applied to captains approaching their sixtieth birthday, Delta introduced evidence that it has had a long-standing practice prohibiting such transfers, regardless of the captain's age, and that this practice was based on the role reversal problems associated with former captains serving as flight engineers. Unlike *Thurston*, Delta's policy was not discriminatory on its face, and thus could not constitute direct evidence of age discrimination.

[4] The notation in Iervolino's file is not necessarily inconsistent with Delta's position that while the FAA's regulations prohibited him from serving as a captain or copilot after his sixtieth birthday and Delta's policy prohibiting any two-step downbids prevented his transfer to the flight engineer position, he remained free to continue his employment at Delta in a non-flying position. In his letter requesting a transfer to the flight engineer position, Iervolino stated that "pending relief from the [age-60] rule," he would be willing to accept "a transfer to non-flying supervisory duty or to a special assignment" provided that his seniority would "continue to accrue, and that the non-line-flying status . . . would be in or from a conceded Second Officer/Flight Engineer status." Plaintiff's Exh. 3. Delta responded that it would be impossible to "honor [his] request that during any such period of employment your position on the seniority list would remain intact," but invited him to explain what non-flying supervisory duty or special assignment would be acceptable to him:

(Footnote continued on following page)

cludes that since he presented direct evidence of age discrimination, the jury should have been instructed that if it found this evidence to be credible, then the burden shifted to Delta to prove by a preponderance of the evidence that the same decision would have been reached even in the absence of age discrimination. We do not reach the question of whether the notation in Iervolino's personnel file constituted sufficient direct evidence of age discrimination to require the giving of such an instruction because even if this notation were sufficient, Iervolino did not object to the instructions on this ground and the failure to give such an instruction in the instant case does not constitute plain error.

Rule 51 of the Federal Rules of Civil Procedure mandates that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Fed.R.Civ.P. 51. In the absence of such an objection, we will reverse only in exceptional cases where the error is " 'so fundamental as to result in a miscarriage of justice.' " *Patton v. Archer*, 590 F.2d 1319, 1322 (5th Cir. 1979) (quoting *Delancey v. Motichek Towing Service, Inc.*, 427 F.2d 897, 901 (5th Cir. 1970));[5] *see*

[4] *continued*

> With respect to your second alternative proposal, *i.e.*, transfer to non-flying supervisory duty or special assignment, I would appreciate your letting me know exactly what you have in mind so that I may properly evaluate your request. Also, in view of the fact that you have conditioned this request on your being allowed to remain on the seniority list, I would appreciate your letting me know if you desire to pursue it in view of the fact that we will be unable to retain you on the seniority list. . . .

Defendant's Exh. 21. However, Iervolino never responded to this request. Record on Appeal, vol. 13 at 235-36, vol. 21 at 2039-42.

[5] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981, *Id.* at 1209.

*also Hunt v. Liberty Lobby*, 720 F.2d 631, 647 (11th Cir. 1983); *Barnett v. Housing Authority*, 707 F.2d 1571, 1580 (11th Cir. 1983).

Since Iervolino did not object to the instructions on the ground that the *McDonnell Douglas* analysis was inappropriate in the instant case,[6] we review the instruction under the plain error standard and conclude that the district court did not commit plain error in instructing the jury on the *McDonnell Douglas* allocation of the burden of proof. We note that Iervolino's proposed instructions were based on the *McDonnell Douglas* approach and did not request that the jury be instructed on the burden of proof in cases where the plaintiff presents direct evidence

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[6] Iervolino claims that since he had objected to the use of the *McDonnell-Douglas* formulation of the burden of proof when he made his motion for a directed verdict the day before the jury was charged, it was unnecessary for him to object to the charge on the same ground. Appellant's Reply Brief at 10-12. However, after carefully reviewing the record, we find that Iervolino did not make such an objection. During Iervolino's argument in support of a directed verdict, the trial court questioned him about the proper burden of proof on Delta's RFOA defense, i.e., its policy prohibiting two-step downbids, and Iervolino's counsel initially responded that an RFOA defense was inappropriate in this case because "[w]e have a case in which age is a factor. . . . The fundamental policy is to oppose anyone working past 60." Record on Appeal, vol. 23 at 2436. The court, however, explained that while Iervolino had presented "some direct evidence" of age discrimination, "the question of the weight and effect of that evidence is totally a question for the jury," and then asked Iervolino whether, in such a case, Delta's policy prohibiting two-step downbids would be "the articulation of a legitimate non-discriminatory reason, which then must be rebutted by you, or overcome or shown to be pretext." *Id.* at 2438. Iervolino agreed that "in the hypothetical situation which the court describes, which is not present here, I think that perhaps could be the view of the Fifth Circuit, at least in that case." *Id.* at 2439. Under these circumstances, we hold that Iervolino did not object to charging the jury on the *McDonnell-Douglas* test.

of discrimination.[7] Moreover, when the court questioned Iervolino's counsel about the appropriate allocation of the burden of proof on the RFOA defense, his counsel conceded that Delta had only the burden of production, not the burden of persuasion. *See supra* note 6.

Iervolino's next contention is that the instructions improperly permitted Delta to defend its policy prohibiting two step downbids as both a RFOA and a BFOQ. Iervolino claims that these defenses cannot be asserted simultaneously with respect to the same policy since factors "other than age" by definition cannot constitute a practice where "age" is a BFOQ. We find no merit in this contention. While it is true that an employment practice cannot *simultaneously* be both a reasonable factor other than age and a bona fide occupational qualification, this does not mean that alternate theories cannot be submitted to the jury, i.e., that a particular practice is age neutral and that even if it were based on age, it is a bona fide occupational qualification. In the instant case, for example, Delta presented evidence that because of safety, it prohibited all captains, not only those who were approaching age 60, from downbidding to flight engineer positions. If the jury

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[7] Iervolino's proposed instructions provide in relevant part:

> The burden of proof is on the plaintiff to show discriminatory treatment by defendant on the basis of age by a preponderance of the evidence. . . .
>
> You must determine whether, taking the evidence as a whole, age was a determining factor in the decision. . . . If more than one factor was involved, plaintiff may prove discriminatory treatment on the basis of age if one of the factors was his age and if age made a difference in Delta's action not to permit him to work as a flight engineer (second officer) beyond his sixtieth birthday. . . .
>
> Defendant denies that it has discriminated on the basis of age and has contended that age was not a factor in its action. However, plaintiff may still prevail if he shows that the reasons defendant has offered were not the real reasons for defendant's actions, but were a pretext for age discrimination.

Record on Appeal, vol. 6 at 1776.

accepted this evidence, then Delta's policy would be a reasonable factor other than age. If, on the other hand, the jury concluded that Delta's policy were age-based, then Delta would still be entitled to justify the policy as a BFOQ.

Iervolino's third argument is that Delta should have the burden of persuasion on the RFOA defense. This concention is without merit. We have repeatedly held that the plaintiff bears the burden of persuasion on the RFOA defense. *See, e.g., Haring v. C.P.C. International Inc.*, 664 F.2d 1234, 1238 (5th Cir. Unit B 1981);[8] *Houser v. Sears Roebuck & Co.*, 627 F.2d 756, 757-58 (5th Cir. Unit A 1980).

2. *BFOQ Defense*

Iervolino challenges the BFOQ instruction on several grounds: (1) that the jury was erroneously instructed that the under-age-60 qualification for the flight engineer position need only be "reasonably" related to safety; (2) that the instructions improperly fused the two-part BFOQ defense articulated in *Western Air Lines v. Criswell*, ____ U.S. ____, 105 S.Ct. 2743, 86 L.Ed.2d 321 (1985), by permitting the jury to consider the need for safety in assessing whether age is a necessary proxy for the flight engineer position; (3) that the jury was precluded from considering the standards of other airlines and the FAA; and (4) that the instructions improperly allowed the jury to consider non-age factors in evaluating Delta's BFOQ defense. These arguments, however, are without merit.

In *Western Air Lines v. Criswell*, ____ U.S. ____, 105 S.Ct. 2743, 2751-53, 86 L.Ed.2d 321 (1985), the Supreme Court explicitly approved the two-part test for evaluating a BFOQ defense articulated in *Usery v. Tamiami Trail*

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[8] In *Stein v. Reynolds Securities, Inc.*, 677 F.2d 33 (11th Cir. 1982), this court adopted as binding precedent all of the post-September 30, 1981, decisions of Unit B of the former Fifth Circuit. *Id.* at 34.

*Tours, Inc.*, 531 F.2d 224, 235-36 (5th Cir. 1976). This test requires the employer to show (1) that the job qualifications are reasonably necessary to the essential operation of the business, and (2) that there is a factual basis for believing that all or substantially all of the persons within the class protected by the ADEA would be unable to perform the job safely and efficiently or that it is impossible or highly impractical to determine job fitness on an individualized basis. 105 S.Ct. at 2751-52. The Supreme Court specifically rejected the argument that the first prong is satisfied where the job qualifications are 'reasonable" in light of the safety risks:

> This proposal is plainly at odds with Congress' decision, in adopting the ADEA, to subject such management decisions to a test of objective justification in a court of law. The BFOQ standard adopted in the statute is one of "reasonable necessity," not reasonableness.

*Id.* at 2754.

Iervolino's first objection is that the instructions incorrectly stated that the age-60 requirement need only be "reasonably" related to the safe transportation of passengers. Although the instructions at one point did improperly state that the job qualification must be "reasonable in light of considerations of safety," Record on Appeal, vol. 25 at 2830, that improper instruction was both preceded and followed by the properly articulated reasonable necessity standard. The instructions began by charging that a BFOQ must be "reasonably necessary to the employer's business," then improperly mentioned reasonableness, but then continued to properly guide the jury in determining whether there was a "significant safety risk," and if so, whether "all or substantially all of the persons excluded by the policy would be unable to perform safely," or if not at all or substantially all persons, whether "some persons excluded by its policy would be unable to perform safely . . . , and . . . it is impossible or highly impractical to determine on an individual basis which ones can safely perform, thereby justifying a gen-

eral rule." *Id.* at 2830-31. The BFOQ instructions concluded with a final statement of the proper reasonable necessity standard. *Id.* at 2832.

In closing argument, Iervolino's counsel also stated the proper standard, *id.* at 2766-71, and Delta's counsel did not contradict this statement. Moreover, a careful review of the charge conference reveals that the court and the attorneys for both sides recognized that the proper standard was reasonable *necessity, not* mere reasonableness. It is apparent from the record that the district court intended to articulate the reasonable necessity standard. *Id.* vol. 24 at 2680-81. It is also significant that Iervolino did not specifically object to the use of the term "reasonable" in the only place that we find an improper use.[9] Evaluating the charge as a whole and its articulation of the proper reasonable necessity standard, and in light of the lack of any specific objection and the proper articulation of the standard in the argument of counsel, we conclude that there has been no reversible error.

Iervolino's next contention is that the jury instructions erroneously fused the two-step analysis of the BFOQ defense into "a single standard of almost complete deference to the employer's decision." Appellant's Brief at 25. The first step is whether the job qualification is reasonably necessary to the safe transportation of passengers. The second step is whether there is a factual basis for believing that all or substantially all of the persons within the protected class would be unable to perform the job safely and efficiently or that it is impossible or highly impractical to determine job fitness on an individualized basis. Iervolino contends that the instructions in the instant case improperly permitted the jury to consider the need for safety in determining whether the second step had been satisfied in the instant case.

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[9] We note that when Iervolino's counsel objected to the use of the term "reasonable" in other contexts, the district court modified the instructions to satisfy these concerns. Record on Appeal, vol. 24 at 2680-81, 2688-89, 2692-96.

Since Iervolino did not object to the instructions on this ground at the charge conference, we review this instruction under the plain error standard, and we find no such error here. The instructions properly charged the second step, i.e., properly informed the jury of the two methods for establishing that age is a necessary proxy for the job qualification: (1) that all or substantially all of the individuals excluded by Delta's policy would be unable to perform the job efficiently and safely, or (2) that it is highly impractical or impossible to determine which persons can perform the job safely. Iervolino asserts, however, that a subsequent reference in the instructions to the discretion that an employer has in establishing job qualifications in cases where there is a greater likelihood of harm improperly permitted the jury to consider the need for safety in assessing the second step, i.e., in determining whether age is a necessary proxy for the job qualifications. This contention is without merit. An examination of the instructions reveals that this passage refers to the first step of the BFOQ defense, i.e., whether the job qualifications are reasonably necessary to the safe transportation of passengers, not to the question of whether age is a necessary proxy for those qualifications.

Iervolino also objects that the instructions improperly precluded the jury from considering the standards of other airlines and the FAA:

> The standard by which the reasonableness of Delta's safety precautions is to be judged is not the standard of other bodies or other airlines.
>
> Instead, its policy must be assessed against Delta's own commitment to safety as demonstrated by what it actually does in the promotion of safety in comparable areas.

*Id.* at 2832. Since Iervolino did not object to this instruction, we review it only for plain error.

In *Western Air Lines*, the Supreme Court concluded that the standards of the FAA and other airlines are relevant to an airline's BFOQ defense, but they are not to

be accorded conclusive weight. 105 S.Ct. at 2754, 2756. Viewing the record as a whole, we are satisfied that the jury would have understood the relevance of the standards of other bodies in determining whether Delta's policy was a BFOQ. First, the instructions specifically informed the jury that the FAA did not have any regulation prohibiting the employment of second officers past age 60.[10] Record on Appeal, vol. 25 at 2833. If the jury was not intended to consider the FAA position, it would have been unnecessary for the instructions to point out what its position was. Moreover, during closing argument, Iervolino repeatedly referred to the fact that the FAA and other airlines have not imposed the age-60 rule as a job qualification for the flight engineer position, *id.* at 2753, 2761-62, 2770, 2771, 2782, and Delta's counsel also referred to the position of the FAA and other airlines, *id.* at 2808-09, 2813-14. We conclude that there is no plain error in this regard.

Finally, Iervolino objects that the jury instructions erroneously permitted the jury to consider non-age factors in determining whether its age 60 requirement for flight engineers was a BFOQ:

> In assessing the bona fide occupational qualification defense asserted by Delta, you may consider more than simply individual plaintiff's ability to perform the task of the second officer job.
>
> You may also consider the effect that allowing the plaintiff or others [similarly] situated to serve as second officer would have on the safety of Delta's operations because of its effect on crew command struc-

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[10] The jury instructions provide in relevant part:

> The Federal Aviation Administration age 60 rule does not by its terms apply to the position of second officer or flight engineer at Delta Air Lines. The FAA has no rule or regulation prohibiting the employment of second officers or flight engineers over the age of 60.

Record on Appeal, vol. 25 at 2833.

> ture, crew communication, and crew concentration, or any other similar reasons relating to safety.

*Id.* at 2831-32. We need not decide whether the district court erred in giving this instruction because even if the consideration of non-age factors in determining whether a particular job qualification is a BFOQ were error,[11] we conclude that this error is harmless in the instant case. The reasonable factor other than age issue was properly before the jury as an issue on which Iervolino had the burden of proof. It is harmless error to also put the issue to the jury in the BFOQ context on which Delta had the burden of proof.

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[11] Other circuits have adopted different positions on this question. *Compare EEOC v. County of Los Angeles*, 706 F.2d 1039, 1042 (9th Cir. 1983) (economic considerations cannot be considered in BFOQ defense), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984); *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 755 (7th Cir.) (economic factors such as "the need to have a definite and financially feasible age upon which a retirement benefit formula could be based" cannot be the basis for BFOQ defense), *cert. denied*, 464 U.S. 992, 104 S.Ct. 484, 78 L.Ed. 2d 680 (1983); *Smallwood v. United Air Lines*, 661 F.2d 303, 308 (4th Cir. 1981) (airline cannot defend maximum hiring age of 35 as a BFOQ because alleged harm to cockpit crew was function of seniority not age), *cert. denied*, 456 U.S. 1007, 102 S.Ct. 2299, 73 L.Ed.2d 1302 (1982); *with Johnson v. American Airlines*, 745 F.2d 988, 991-93 (5th Cir. 1984) (permitting consideration of airline's seat blocking and back seat driver factors in BFOQ defense), *cert. denied*, ___ U.S. ___, 105 S.Ct. 3500, 87 L.Ed.2d 631 (1985); *Murnane v. American Airlines*, 667 F.2d 98, 100-01 (D.C. Cir. 1981) (permitting BFOQ defense to be based on a combination of factors including age, effects of the age 60 rule, lengthy training requirements, and experience), *cert. denied*, 456 U.S. 915, 102 S.Ct. 1770, 72 L.Ed.2d 174 (1982). We note that in the context of a sex discrimination case, we have held that because "the BFOQ defense is available only when the employer can show that the excluded class is unable to perform the duties that constitute the essence of the job," the potential for fetal harm is irrelevant to the BFOQ issue "unless the employer shows a direct relationship between the policy and the actual ability of a pregnant or fertile female to perform her job." *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1549 (11th Cir. 1984).

B. *The Denial of JNOV and a New Trial*

Iervolino next contends that the district court erred in denying his motion for JNOV or for a new trial with respect to Delta's RFOA and BFOQ defenses. These contentions, however, are without merit.

The appropriate standard of review for the denial of a motion for JNOV is whether, considering the evidence in the light most favorable to the non-moving party, the evidence so strongly points in favor of one party that reasonable men could not reach a contrary verdict. *See, e.g., Warren v. Ford Motor Credit Co.*, 693 F.2d 1373, 1374-75 (11th Cir. 1982); *Boeing v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). We review the denial of a new trial under a different standard. The denial of a new trial is proper when, after weighing the evidence, the trial court cannot find that the verdict is contrary to the great weight of the evidence. *See, e.g., Jackson v. Magnolia Brokerage Co.*, 742 F.2d 1305, 1307 (11th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 2704, 86 L.Ed.2d 720 (1985). On appeal, we will reverse the trial court's denial of a new trial only for abuse of discretion. *See, e.g., Rabun v. Kimberly-Clark Corp.*, 678 F.2d 1053, 1060 (11th Cir. 1982).

We conclude that the district court's denial of JNOV was proper in the instant case. Turning to the RFOA defense, we find that there is substantial evidence to support this defense. For example, Delta presented evidence that it refuses to allow any captain, regardless of age, to downbid to the flight engineer position. *See, e.g.*, Record on Appeal, vol. 16 at 866-67, 870-71, vol. 20 at 1893-94; Defendant's Exh. 21. Delta justified this policy on the ground that a former captain serving as a flight engineer would create role reversal problems. *See, e.g.*, Record on Appeal, vol. 15 at 731-33, vol. 17 at 1235-41, vol. 20 at 1830-33, vol. 21 at 2132-36, vol. 22 at 2242-44. Although Iervolino offered a variety of evidence to show that Delta did not have such a policy, the resolution of disputed facts is properly the role of the jury.

We also conclude that the BFOQ defense was amply supported by the record. With respect to the first prong of this defense (whether the age-60 rule is reasonably necessary to the safe transportation of passengers), Delta introduced ample evidence, including accident reports and the testimony of pilots, to show that the improper performance of a flight engineer's duties could adversely affect flight safety, especially during emergencies. *See, e.g., id.* vol. 16 at 974-81, 988-92, vol. 19 at 1713-22, vol. 21 at 2130, vol. 22 at 2170-71, 2240-41. There was also ample evidence in the record to establish the second prong of the BFOQ defense (either that all or substantially all individuals in the excluded group could not safely and efficiently perform the job or that it would be impossible or highly impractical to predict which individuals would be unable to perform the job). For example, Delta presented expert testimony that certain age-related diseases become more prevalent at the age of 60 and that medical science is presently unable to predict which individuals will be affected by these diseases. *See id.* vol. 17 at 1025-43, vol. 18 at 1331-39. Thus, we find that the district court's denial of JNOV with respect to Delta's RFOA and BFOQ defenses was proper.

We also find no merit in Iervolino's contention that the denial of a new trial constituted an abuse of discretion. As described above, there was ample evidence to support both defenses, and we conclude that the district court did not abuse its discretion in finding that the jury verdict was not contrary to the great weight of the evidence.

C. *Other Contentions*

Finally, Iervolino challenges the district court's refusal to instruct the jury on his disparate impact claim and numerous evidentiary rulings. We reject these contentions.

Iervolino first contends that the district court improperly refused to instruct the jury on the disparate impact theory. He concedes that the disparate impact theory was

not expressly listed as a theory of liability in the pretrial order, but claims that the references in the pretrial order and its attachments to subsections 623(a)(1) and 623(a)(2) of the ADEA, the EEOC regulations and case law involving, *inter alia*, a disparate impact claim put Delta on notice that he would present a disparate impact claim.

We will not reverse a decision of the trial court enforcing a pretrial order absent an abuse of discretion, *see, e.g., Woods v. Burlington N.R.R. Co.*, 768 F.2d 1287, 1291 (11th Cir. 1985), *cert. granted on other grounds*, ___ U.S. ___, 106 S.Ct. 1456, 89 L.Ed.2d 714 (1986); *Lloyd v. Professional Realty Services, Inc.*, 734 F.2d 1428, 1432 n. 12 (11th Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 908, 83 L.Ed.2d 922 (1985), and we find no abuse of discretion in the instant case. At the pretrial conference, the district court repeatedly warned the parties that they would be held to the theories of liability designated in the pretrial order, Record on Appeal, vol. 11 at 129-30, 133-34, and Iervolino even filed a supplement to the pretrial order to include additional claims for relief, *id.* vol. 6 at 1539-40. Thus, Iervolino was put on notice that any legal theories not included in the pretrial order would be waived.

We also find that the references in the pretrial order, *id.* vol. 3 at 1432-39, were insufficient to give notice to either Delta or the court that Iervolino would rely upon a disparate impact theory. Subsections 623(a)(1) and 623(a)(2) of the ADEA do not refer to the disparate impact method of proof, and the pretrial order simply referred in general terms to the EEOC regulations on age discrimination. The case listed in the order, *Monroe v. United Air Lines*, 31 Empl.Prac.Dec. (CCH) ¶ 33,330 (N.D. Ill. 1983), *rev'd*, 736 F.2d 394 (7th Cir. 1984), did involve a disparate impact jury instruction, but this instruction was simply one of several issues in the case. Since Iervolino was on notice that its legal theories had to be included in the pretrial order, and since it did not comply with this requirement, the district court did not abuse its discretion

by refusing to charge the jury on the disparate impact claim.[12]

Iervolino also argues that the district court abused its discretion in several evidentiary rulings, but only three of these rulings warrant discussion. The admissibility of evidence is committed to the sound discretion of the district court, and even if error is found, the party asserting the error must show that substantial rights were adversely affected. *See, e.g., Perry v. State Farm Fire & Casualty Co.*, 734 F.2d 1441, 1446 (11th Cir. 1984).

First, Iervolino contends that the district court erred in excluding the identities of the commercial airlines that have permitted flight engineers, including former captains, to serve after age sixty. Iervolino claims that this evidence was probative on the question of whether the age sixty requirement was a BFOQ for the flight engineer position. We agree that the exclusion of the identities of the other airlines was probably error since this evidence would have clarified that the airlines which permitted individuals over age sixty to serve as flight engineers included large commercial carriers comparable to Delta and therefore would be relevant to the question of whether Delta's age sixty requirement is a BFOQ for the flight engineer position. *See Western Air Lines v. Criswell*, ___ U.S. ___, 105 S.Ct. 2743, 2748, 2754, 2756, 86 L.Ed.2d 321 (1985). However, we conclude that the exclusion of this evidence is not reversible error in the instant case. Iervolino was permitted to introduce the testimony of several

[12] We respectfully disagree with the dissent's suggestion that all parties were aware that Iervolino intended to rely upon the disparate impact theory. The pretrial order was cast in the mode of a disparate treatment theory; the opening statements of both attorneys and the introductory remarks of the trial judge to the jury all assumed that the case was a disparate treatment case. Finally, the evidence in the case focused on the disparate treatment theory, and the little evidence which would also have been relevant to a disparate impact theory was also relevant to disparate treatment.

flight engineers who had served past the age of sixty, *see, e.g.*, Record on Appeal, vol. 12 at 84-105, vol. 15 at 623-710, and a document listing 485 persons who have served or are serving as flight engineers after reaching the age of sixty, Plaintiff's Exh. 337. In his closing argument, Iervolino's counsel also emphasized that this evidence showed that allowing former captains to serve as flight engineers would not create any crew coordination problems and that age was not a necessary proxy for the flight engineer position. Record on Appeal, vol. 25 at 2761-62, 2771. Iervolino also introduced evidence and emphasized in his closing argument that the FAA had not extended the age sixty requirement for captains and first officers to flight engineers, *see* Plaintiff's Exh. 317; Record on Appeal, vol. 25 at 2753, 2770-71, and the jury was instructed on the FAA's position, Record on Appeal, vol. 25 at 2833. Thus, we are satisfied that the jury was aware that the industry as a whole had not imposed an age sixty requirement for flight engineers.

Iervolino's next contention is that the district court abused its discretion in admitting evidence of the medical condition of Mr. A.B. Paul, another captain who had withdrawn as a plaintiff before the instant case went to trial. We reject this contention. Paul's medical condition was relevant in the instant case since it illustrated the decrements which accompany the aging process. Under Fed.R. Evid. 403, the question of whether the probative value of evidence is substantially outweighed by the risk of unfair prejudice is committed to the broad discretion of the trial court, *see Noel Shows, Inc. v. United States*, 721 F.2d 327, 329 (11th Cir. 1983), and we find no abuse of discretion in the instant case.

Iervolino also argues that the district court abused its discretion by permitting Delta to play the cockpit tape recording from Flight 1080. Iervolino claims that this evidence was inadmissible under Fed.R.Evid. 403 since the flight engineer did not play any role in the resolution of the emergency and the probative value of this evidence was therefore outweighed by the risk of unfair prejudice.

However, we find no abuse of discretion in the admission of this tape. This tape illustrated the importance of crew coordination during an emergency, and revealed the supportive role of the flight engineer during an emergency. In fact, the flight engineer involved in the incident testified that he considered questioning the captain's actions but decided to keep "[his] mouth closed." Record on Appeal, vol. 22 at 2344-46. Thus, this tape and related testimony showed the potential problem that might arise if a former captain served as a flight engineer. The district court did not abuse its discretion in finding that the probative value of this tape was not substantially outweighed by the danger of unfair prejudice.

We have carefully considered Iervolino's other challenges to the district court's evidentiary rulings, but we conclude that they have no merit and warrant no further discussion.

## III. CONCLUSION

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

JOHNSON, Circuit Judge, dissenting:

My problem with the majority's opinion is with its summary disposition of the evidentiary issues, with its resolution of the disparate impact instruction claim, and with its refusal to afford relief based upon the instructions given by the trial court on the bona fide occupational qualification question.

*Evidentiary Issues:*

Generally a trial court's rulings on admissibility of evidence will be disturbed on appeal only for abuse of discretion. *United States v. Russell*, 703 F.2d 1243, 1249 (11th Cir. 1983). The trial court's decisions on the relevance of proffered evidence is also subject to an abuse of discretion standard. *United States v. Veal*, 703 F.2d 1224, 1230 (11th Cir. 1983). Fed.R.Civ.P. 61 permits setting aside a verdict on grounds of error in admitting or excluding evidence if required by "substantial justice." I would hold that Iervolino has stated a valid allegation of error as to three of the trial court's evidentiary rulings and that substantial justice requires a new trial.

First, the trial court refused to admit the identities of those airlines that permit captains to make two-step downbids so as to continue flying after age 60. Iervolino's concern is that by not revealing that these were major airlines (Alaska, American, Braniff, Flying Tiger, Northwest, Pan Am, TWA, United, USAir, Western) the jury might speculate that the appellant was talking about small carriers not comparable to Delta. The airline appellee claims that the exclusion was proper on grounds of prejudice because the jury "would have recognized the names of the carriers permitting such a practice and would have, based upon their personal experiences with those carriers, attributed poor judgment to Delta."

This is precisely why the evidence was improperly excluded. The issue is whether age is a valid proxy for a given job qualification—namely the ability safely to function as a flight engineer. Assuming *arguendo* that indi-

vidualized determinations of fitness are not feasible, the best evidence one could offer to prove or disprove age-based discrimination is the general practice and experience of the industry as a whole. Thus the Supreme Court held that, in resolving a challenge to an airline's mandatory retirement policy for flight engineers and in weighing conflicting testimony, the practice of competitors is highly probative and would sustain the jury's verdict on appeal. "When an employee covered by the Act is able to point to reputable businesses in the same industry that choose to eschew reliance on mandatory retirement earlier than age 70 . . . the employer's attempt to justify its decision on the basis of the contrary opinion of experts—solicited for the purposes of litigation—is hardly convincing on any objective standard short of complete deference." *Western Air Lines v. Criswell*, ___ U.S. ___, ___, 105 S.Ct. 2743, 2756, 86 L.Ed.2d 321 (1985). The Court found such evidence probative and important because it assisted the jury in determining whether the company's reliance upon age as a proxy was based upon a reasonable necessity, the operative standard. By qualifying the word "businesses" with "reputable" the Court obviously anticipated that the names of these businesses would be admitted. It was an abuse of discretion to keep them out and the result of prejudice. Upon a proper comparison between the practice of Delta and that of its major competitors the jurors might well have reached a contrary conclusion on Iervolino's age claim.

Second, the trial court permitted Delta to play for the jury a tape recording of an actual in-flight emergency. Iervolino claims it was inadmissible, pointing out that in the incident in question the flight engineer played *no role* in the resolution of the crisis and hence the probativeness was outweighed by prejudice and should have been excluded under Fed.R.Evid. 403. Delta does not contest that in this taped incident the flight engineer was not involved but argues that it was generally probative. The admission of this evidence was clear error. The relevance was nil. It was mere theatrics designed to inflame the

jury; again the result was to inject into the minds of the jurors inaccurate, prejudicial information that in all likelihood skewed their deliberations.

The appellant complains third that the trial court permitted the introduction of the medical history and condition of Mr. A.B. Paul, another captain who earlier had been a party to this suit but who withdrew prior to trial. The court permitted Delta to read 177 pages of deposition into the record to show the serious health problems of this over-60 pilot as relevant to the BFOQ defense. The appellee argues that this evidence was highly probative as anecdotal evidence of "the decrements which can accompany age." Any prejudice, Delta claims, was harmless.

I believe it was clear error. Paul was not a party to this suit and there was no foundation laid to show that he was in any way representative of over-60 pilots. *Western* and the ADEA both require that employment decisions be made on an individual basis unless substantially all persons over 60 could not perform the job or there is no effective means of screening the various employees. ____ U.S. at ____ & n. 16, ____, 105 S.Ct. at 2750 & n. 16, 2756. Neither is the case here, at least on the evidence on this record. The prejudice far outweighed any probative value.

The majority today disposes of these questions summarily. I believe that they represent serious error at the trial level, especially the first allegation of error involving the identity of other airlines that permit two-step downbids. Thus I dissent and would instead remand this case for a new trial and a new verdict untainted by such clear error.

*Erroneous Instructions:*

The trial court refused to give the jury an instruction on appellant's right of recovery under the theory of disparate impact, basing that denial on the fact that the appellant had not clearly set this forth as a theory of liabil-

ity at the pretrial conference.[1] Finding that the appellant failed to raise this matter at the appropriate time, the majority would refuse to hear the claim by invoking the abuse of discretion rule. I believe that the trial court was clearly erroneous and I would reverse on this ground as well.

At the first day of trial, appellant argues, he informed the court that he intended to pursue this line in his summary of contentions and the court received evidence under this theory. Iervolino argues that when, at pretrial, his counsel informed the court that he intended to pursue his remedies under the ADEA, §§ 623(a)(1) and (2), this of necessity incorporated his intent to rely on the two theories of recovery available under the statute.

Delta did not object to introduction of evidence of disparate impact at trial nor did it object to the requested instruction on grounds of surprise or prejudice. On appeal it argues that this avenue is blocked by Fed.R.Civ.P. 16(e), which rule requires that a pretrial order "shall control the subsequent course of the action unless modified by a subsequent order." Delta argues that, because the statute does not provide in words for a "disparate impact" remedy, mere reference to the statute does not incorporate this theory. This, of course, proves too much. The statute does not provide in words for the disparate *treatment* theory of recovery either. Both have been imported from analogous statutes. Delta's argument in a nutshell is that telling the court that one intends to present a case under the ADEA does not inform the court or the defendant that one intends to seek a remedy. This is clearly wrong.

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[1] Appellant argues that had he been allowed to pursue this line he might have prevailed because recovery under the disparate impact theory does not require proof of intent, which must be shown in a disparate treatment case. *Nash v. Consolidated City of Jacksonville*, 763 F.2d 1393, 1397 (11th Cir. 1985).

It is clear from the transcription of the discussions at the pretrial conference that all actors below were aware that Iervolino planned to argue disparate impact. The majority overlooks the fact that at the pretrial conference, when the parties and the judge engaged in a lengthy colloquy to set forth the theories of recovery, remedy sought, and defenses offered, Iervolino's attorney clearly noted that he planned to pursue a disparate impact argument. That he planned to do so was so obvious to all parties that Iervolino's lawyer twice stated his desire not to be misunderstood as relying solely upon that theory: "I don't want the court to . . . misunderstand that ours is only a disparate impact claim, it's [also] a disparate treatment claim . . ." R. 11-147.

Even if Rule 16(e) is implicated by the failure to include in the pretrial order the express election of the disparate impact theory, that Rule also provides that a defect may be remedied by modifying the pretrial order to "prevent manifest injustice." I would do so here. Regardless of any putative deficiencies in the pretrial order, I think it clear from the record that both the trial court and Delta knew from the beginning that this was one theory of recovery. Delta never objected to the introduction of evidence in support of this theory and failed to show that prejudice would follow from such instruction. Under these circumstances, I think the trial judge clearly erred in refusing Iervolino's request. Given the differences in the standard of proof for this theory, prejudice to Iervolino was inevitable.

I am likewise unable to accept the majority's determination that the trial court's instruction on the BFOQ issue was both proper and unassailable due to the operation of the plain error rule. I believe that the instructions were demonstrably improper when compared with the operative legal standard and that Iervolino should not be foreclosed from advancing this argument today because the error below was so manifest as to constitute plain error.

Appellant challenges the jury instructions because the trial court stated that the proper standard for determin-

ing whether the Delta policy constituted a BFOQ was "reasonableness" rather than "reasonable necessity." Our proper task is to review the instructions as a whole.[2] From that perspective there was plain error.

In our now seminal opinion in *Usery v. Tamiami Trail Tours*, 531 F.2d 224, 236 (5th Cir. 1976), we articulated a two-step standard of review for evaluating safety-related BFOQ defenses: 1) the age-related BFOQ must be "reasonably necessary" to the "essence" of the business operation; and 2) the employer must show a) that he had a "reasonable cause" to believe that all or substantially all of a given age-based class of employees "would be unable to perform safely and efficiently the duties of the job involved" or b) that "it is impossible or impractical" to screen individual employees for age-related health problems affecting work performance. 531 F.2d 235-36.

—The "essence" prong:

In *Western* the airline directly challenged the "reasonably necessary" *Tamiami* instruction for the essence prong, arguing that more deference was due airlines to insure the essence of their business—the safety of their passengers. Western argued that it should be able to succeed on a BFOQ defense if it could show a "rational basis in fact" for its belief that flight engineers over age sixty posed a safety hazard. The Supreme Court squarely rejected this, finding that the 1978 amendments to the ADEA implicitly adopted the instruction we articulated in *Tamiami*. Congress sought "to subject such management decisions to a test of objective justification in a court of law." ____ U.S. at ____, 105 S.Ct. at 2754.

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[2] On appeal we must examine the instructions "in the 'context of the overall charge' and the circumstances of the case . . . . [We must be] satisfied that the jury's attention was adequately focused" on the proper legal standards. *Western*, ____ U.S. at ____, 105 S.Ct. at 2755. Thus the standard is plenary; there is no suggestion of deference or presumption as to the trial court's instructions.

The only question, then, is whether the trial court's instructions were improper because they might have led the jury to believe that the legal standard for finding a BFOQ was reasonableness.[3] Contrary to the majority, I believe that, viewed as a whole, the instructions were misleading. The trial court did use the words "reasonable necessity" in its essence instruction. But it summarized the instruction by using the words "reasonable in light of considerations of safety"—a characterization to the same effect as that requested and rejected in *Western*. ____ U.S. at ____-____, 105 S.Ct. at 2753-54. A few paragraphs later the trial judge did precisely the same thing again.[4] This significantly diluted the force of the instruction, especially

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[3] In relevant part the instructions were as follows:

> [I]t is Delta's burden to establish the existence of a bona fide occupational qualification, and they must establish that by a preponderance of the evidence.
>
> Now, a bona fide occupational qualification is one which is *reasonably necessary* to the employer's business. It is reasonably necessary if it relates to the essence of the business, which in this case is the safe transportation of passengers.
>
> Thus, to be justified as a bona fide occupational qualification, Delta's policy must be related to the safe transportation of its passengers, or stated another way, must be *reasonable* in light of considerations of safety.

R. 25-2830 (emphasis supplied).

[4] The trial judge instructed as follows:

> In this connection, I charge you that the greater the need for the exercise of safety brought about by the likelihood of harm and the probable severity of that harm in case of an accident, the more discretion the employer may lawfully exercise in establishing job qualifications. Where the risks are high and the requirements for the exercise of safety are great, the law permits an employer to establish more stringent employee standards, if it can show that such standards are *reasonably necessary* to reduce the risks of harm to any significant degree.
>
> The standard by which the *reasonableness* of Delta's safety precautions is to be judged is not the standard of other bodies or other airlines.

R. 25-2832 (emphasis supplied).

when one realizes that the words "reasonable necessity" were buried in a mass of verbiage extending over three typed pages.

Our case law has held that an argument waived in the trial court may be reviewed on appeal only for "plain error," which we have defined as error that is "both obvious and substantial." *United States v. Smith*, 700 F.2d 627, 633 (11th Cir. 1983). In light of the clear holdings of the former Fifth Circuit in *Tamiami*, and of the Supreme Court in *Western*, there is no question but that the error in the trial court's instruction ought to have been obvious to all. Further, that error was substantial because it expanded the extremely narrow BFOQ exception contrary to the clear intent of Congress and the holding of the Supreme Court.[5] Thus, I believe we can and should reach this allegation of error and grant relief in the form of a new trial.

—The second prong:

The second prong requires showing either of two possible justifications for age-based discrimination—that all or nearly all people over sixty would be unable to perform safely the task of flight engineer, or that while some would not be able to perform it there is no feasible way

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[5] While the Supreme Court said clearly that the BFOQ standard is "reasonable necessity," *Western*, 105 S.Ct. at 2754, it two weeks later denied *certiorari* on a Fifth Circuit case that had jury instructions virtually identical to those in this case. *Johnson v. American Airlines, Inc.*, 745 F.2d 988, 993-94 (5th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 3500, 87 L.Ed.2d 631 (1985). Of course denial of *certiorari* is not properly taken to be a statement as to the merits of the case, *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919, 70 S.Ct. 252, 255, 94 L.Ed. 562 (1950) (Opinion of Frankfurter, J., respecting denial of *certiorari*). The instructions in *Western* and *Johnson* cannot be reconciled; accordingly, we must follow the *Western* standards, which suggest that the instructions here were incorrect.

to separate the wheat from the chaff.[6] The appellant argues that the court's instructions on the second prong incorporated irrelevant issues that again diluted the force of the legal standard by suggesting that the jury should be unduly deferential to Delta's safety concerns.[7]

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[6] Our opinion in *Tamiami* suggests that the required showing is one of "reasonable cause." While the Supreme Court relied upon *Tamiami* as the controlling standard it *sotto voce* modified *Tamiami* so that the second prong is also governed by the reasonably necessary standard. ___ U.S. at ___, 105 S.Ct. at 2756.

[7] The judge first stated the proper two-part inquiry on the second prong, then went on, in relevant part, to modify the instructions as follows:

> [Y]ou may consider more than simply the individual plaintiff's ability to perform the duties of the second officer job.
>
> You may also consider the effect that allowing the plaintiff or others situated to serve as second officer would have on the safety of Delta's operations because of its effect on crew command structure, crew communication and crew concentration or any other similar reasons related to safety.
>
> In this connection, I charge you that the greater the need for the exercise of safety brought about by the likelihood of harm and the probable severity of that harm in case of an accident, the more discretion the employer may lawfully exercise in establishing job qualifications. Where the risks are high and the requirements for the exercise of safety are great, the law permits an employer to establish more stringent employee standards, if it can show that such standards are reasonably necessary to reduce the risks of harm to any significant degree.
>
> The standard by which the reasonableness of Delta's safety precautions is to be judged is not the standard of other bodies or other airlines.
>
> Instead, its policy must be assessed against Delta's own commitment to safety as demonstrated by what it actually does in the promotion of safety in comparable areas.
>
> And also, your assessment will be based on and considered by you in light of all of the other evidence in the case, on the risks involved, and the tendencies, if any, of Delta's policy to reduce those risks.

R. 25-2831-32.

Here there is plain error in two respects. First, the language in the third paragraph quoted in footnote 7 of this dissent is the so-called "adjusts to the safety factor" clause that belongs as a modifier of the essence prong. *Western*, ____ U.S. at ____, 105 S.Ct. at 2751. Instead the trial court buried it in the discussion of the second prong. Placement is important because this sliding scale determines only the extent to which safety is the essence of the business. It permits a "looser fit" in defining "essence," thus introducing *subjective* factors into the analysis. By placing the safety instruction where it did, the trial court permitted the jury to consider the need for flight safety in considering the second prong's job fitness inquiry. This subjectivity is reinforced by the last, "all other evidence" paragraph in footnote 7 that invites an open-ended incorporation of whatever other factors suit the jury's fancy.

On the other hand, the second prong should function as a strictly *objective* test. The employer must show that nearly all those over sixty are unable to do the job, as defined by objective factors, or that there is no valid scientific measure that permits determining who is or is not capable. The first prong focuses on business safety factors that are *independent* of age; the second prong focuses on those cases where age is a *permissible proxy* for these safety factors. By placing this clause in the instruction after the second prong's discussion of the effects of age on the employee, the trial court impermissibly redirected the focus, permitting looser fit for age-based generalities not tailored to the individual traits of employees.

Again, I would find this plain error. The effect was to conflate the two prongs, making it impermissibly easier for the employer to show a BFOQ by means of aggregate characteristics "inconsistent with the preference for individual evaluation expressed in the language and legislative history of the ADEA." *Western*, ____ U.S. at ____, 105 S.Ct. at 2756. The potential for jury confusion was obvious. Even if placement were not a problem, the trial court again summarized the standard as reasonableness

instead of reasonable necessity. Either way it was error that justifies relief.

Second, the instructions stated in the fourth and fifth paragraphs of footnote 7 that this "adjust to the safety factor" requires the jury to defer to the particular safety standards that Delta itself has chosen to adopt—rather than to compare them with general industry standards. This is squarely at odds with *Western*. There too the airline argued that the jury should be instructed to "defer to 'Western's selection of job qualifications for the position of [flight engineer] that are reasonable in light of the safety risks.' . . . This proposal is plainly at odds with Congress' decision, in adopting the ADEA, to subject such management decisions to a test of *objective* justification in a court of law. The BFOQ standard adopted in the statute is one of 'reasonable necessity,' not reasonableness." ___ U.S. at ___, 105 S.Ct. at 2754 (emphasis supplied, brackets in original). Demonstration of an objective justification for a mandatory retirement and no downbid policy, of necessity, required that the jury be directed to the standards of the industry, not merely to those enunciated by the defendant. The Supreme Court expressly held such evidence relevant and probative, though not necessarily dispositive, of this question. *Id.* The fact that so many allow what Delta denies suggests that the policy is not a BFOQ because it does not go to the essence of the business. It was both obvious and substantial error for the trial court to exclude this evidence from the jury's consideration, and I believe it constitutes grounds for reversal.

I would reverse the judgment below and remand this case for a new trial untainted by the various errors noted.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 84-8852

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D.C. Docket No. 81-2327

JOSEPH A. IERVOLINO,

Plaintiff-Appellant,

versus

DELTA AIR LINES, INC.,

Defendant-Appellee.

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Appeal from the United States District Court
for the Northern District of Georgia

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Before JOHNSON and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

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JOHNSON, Circuit Judge, dissented and filed an opinion.

Entered: August 15, 1986
For the Court: Miguel J. Cortez, Clerk
By: /s/ JEAN LEONARD
Deputy Clerk

ISSUED AS MANDATE: OCT 8 1986

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8852

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
SEP 25 1986
MIGUEL J. CORTEZ
CLERK

JOSEPH A. IERVOLINO,

Plaintiff-Appellant,

versus

DELTA AIR LINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion August 15, 11 Cir., 1986, ____ F.2d ____).

Before JOHNSON and ANDERSON, Circuit Judges and DYER*, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the

members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. LANIER ANDERSON, III
United States Circuit Judge

REHG-6
(Rev. 6/82)

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GA.
Atlanta Div. — Docket No. C81-2327A

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Case Title: JOSEPH A. IERVOLINO v. DELTA AIR LINES, INC.

Name of Judge or Magistrate:
J. OWEN FORRESTER

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☒ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

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IT IS ORDERED AND ADJUDGED

that judgment is hereby entered for the defendant DELTA AIR LINES, INC., and against the plaintiff JOSEPH A. IERVOLINO: that the plaintiff take nothing; that the action hereby is dismissed on the merits; and that the defendant recover its costs of action.

FILED AND ENTERED IN CLERK'S OFFICE
June 22, 1984

BEN H. CARTER

by: /s/ DELORES W. PAGE
Deputy Clerk

* * * * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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FILED IN CLERK'S OFFICE
U.S.D.C. – Atlanta
OCT 3 1984
BEN H. CARTER, Clerk
By: /s/ _____
Deputy Clerk

JOSEPH A. IERVOLINO,

Plaintiff,

vs.

DELTA AIR LINES, INC.,

Defendant.

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CIVIL ACTION NO. C81-2327A

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## ORDER OF THE COURT

This case is before the court on a motion for a judgment notwithstanding the verdict or in the alternative for a new trial, a motion to alter or amend the judgment to have each party bear its own costs, on a renewed motion for sanctions, and on a motion for review of costs.

The motion for JNOV or in the alternative for a new trial is DENIED. The court has considered the reasons advanced in support of the motion to alter and amend and is of the opinion that none of these reasons are sufficient to grant the relief requested.

* * *

IT IS SO ORDERED this 30th day of September, 1984.

/s/ J. Owen Forrester
UNITED STATES DISTRICT JUDGE

## COURT'S CHARGE TO THE JURY
(relevant portions)
Tr. 2827-32, June 21, 1984

* * *

[2827] To begin with, you need to understand that the burden of proof is always on the plaintiff, Mr. Iervolino, to show discriminatory treatment by the defendant on the basis of age.

He must show this by a preponderance of the evidence. Thus Mr. Iervolino must convince you that age was a determining factor in Delta's decision to refuse to allow him to down bid.

Now, I have several times used the phrase determining factor. What this means is that if the evidence which you have heard establishes that more than one factor was involved in Delta's decision, then the plaintiff must establish by a preponderance of the evidence not only that his age was one of the factors considered by Delta, but also that consideration of his age actually made a difference in the decision which was made.

The plaintiff, in other words, must prove that but for his age, Delta would have granted his request.

Now, as I have noted earlier, Delta denies that it discriminated against Mr. Iervolino on the basis of age and has [2828] contended that age was not a determining factor in its action.

Instead, it says that its decision was based upon a policy of not permitting two-step bid downs by any Delta captain to second officer regardless of age.

Thus, Delta says that its decision was based on reasonable factors other than age.

Plaintiff may not recover unless he proves by a preponderance of the evidence that Delta did not have such a policy, or that the policy was not reasonably justified by legitimate business purposes.

Said another way, the plaintiff must demonstrate that this reason is but a pretext for discrimination on account of age.

To prove that it was a pretext, the plaintiff must prove by a preponderance of the evidence that Delta's explanation was merely an excuse for discriminating against the plaintiff on the basis of age or that its contention about having such a policy are unworthy of belief.

In this respect, of course, plaintiff says that Delta does not have any policy prohibiting a captain from serving. Does not have policy prohibiting captains from serving as second officers except for those at or approaching their 60th birthday.

In order to show that he was treated in a discriminatory manner because of his age, Mr. Iervolino must show discriminatory motive or intent on the part of Delta. [2829] Ordinarily, intent or motive cannot be proved directly, because it is too difficult to fathom or scrutinize the operations of the human mind.

In addition to direct proof, then, you may also consider circumstantial evidence such as all of the surrounding circumstances, and it would be permissible for you to infer intent or motive from such evidence.

Now, as I have said, if under the instructions I have given you you determine that Mr. Iervolino was not denied his request on account of his age, then your deliberations are over, and you must return a verdict for Delta.

If on the other hand you determine that Mr. Iervolino has shown that age was a determining factor in Delta's denial of his request, then you must still consider whether age—whether or not age is a bona fide occupational qualification for the position of second officer or flight engineer.

If you find that age is a bona fide occupational qualification, then any discrimination which you have found is not unlawful, and the plaintiff is not entitled to recover any damages.

If on the other hand you found discrimination and you find that age is not a bona fide occupational qualification, then you must return a verdict for Mr. Iervolino.

Delta must establish the bona fide occupational qualification defense by a preponderance of the evidence.

[2830] Let me hesitate here to show you what's going on.

Mr. Iervolino must show by a preponderance evidence that the reason or the determining factor for the action taken was age and he must show that to you by a preponderance of the evidence. And I'll tell you what that means later.

However, it is Delta's burden to establish the existence of a bona fide occupational qualification, and they must establish that by a preponderance of the evidence.

Now, a bona fide occupational qualification is one which is reasonably necessary to the employer's business. It is reasonably necessary if it relates to the essence of the business, which in this case is the safe transportation of passengers.

Thus, to be justified as a bona fide occupational qualification, Delta's policy must be related to the safe transportation of its passengers, or stated another way, must be reasonable in light of considerations of safety.

So your first step is to determine whether the improper performance of the duties of the second officer impose a significant safety risk.

If you determine that such does pose a significant safety risk, then next you must consider whether Delta has shown you by a preponderance of the evidence either that all or substantially all of the persons excluded by its policy would be [2831] unable to perform safely as a second officer after the age 60, having previously served as a captain.

If you find that the duties established by Delta for a second officer make more than a minimal contribution to safety, and if you believe that all or substantially all of the persons excluded by the policy would be unable to perform them safely and efficiently, then your deliberations are over. You've found a bona fide occupational qualification.

If, however, you do not believe that all or substantially all persons excluded would be unable to perform safely and efficiently, then you must next consider whether Delta has demonstrated by a preponderance of the evidence that some persons excluded by its policy would be unable to perform safely and efficiently as second officers for Delta, and that it is impossible or highly impractical to determine on an individual basis which ones can safely perform, thereby justifying a general rule.

In assessing the bona fide occupational qualification defense asserted by Delta, you may consider more than simply the individual plaintiff's ability to perform the tasks of the second officer job.

You may also consider the effect that allowing the plaintiff or others situated to serve as second officer would have on the safety of Delta's operations because of its effect on crew command structure, crew communication and crew [2832] concentration or any other similar reasons relating to safety.

In this connection, I charge you that the greater the need for the exercise of safety brought about by the likelihood of harm and the probable severity of that harm in case of an accident, the more discretion the employer may lawfully exercise in establishing job qualifications. Where the risks are high and the requirements for the exercise of safety are great, the law permits an employer to establish more stringent employee standards, if it can show that such standards are reasonably necessary to reduce the risks of harm to any significant degree.

The standard by which the reasonableness of Delta's safety precautions is to be judged is not the standard of other bodies or other airlines.

Instead, its policy must be assessed against Delta's own commitment to safety as demonstrated by what it actually does in the promotion of safety in comparable areas.

And also, your assessment will be based on and considered by you in light of all of the other evidence in the case, on the risks involved, and the tendencies, if any, of Delta's policy to reduce those risks.

Now, there are a few things that I wish to tell you about that you shouldn't worry about.

It is no defense to a charge of age discrimination that some younger co-worker crew members oppose the presence of a flight engineer simply because he is over 60.

* * *